MAYBANK ISLAMIC BHD v. SUNHOR BUILDERS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[CIVIL SUIT NO: WA-22M-198-10-2016]
31 MAY 2022

Abstract – *(i) The time for applying to set aside a default judgment runs from the receipt of the order/judgment, not from when a defendant comes to know of it; and (ii) the annulment of an adjudicating order necessarily means that there had never been any adjudication and there was never a bankrupt. In such situation, there is no requirement on a plaintiff to obtain any leave of the court to file a writ against a defendant.*

CIVIL PROCEDURE: *Judgments and orders – Default judgment – Setting aside – Application to set aside default judgment – Whether date runs from receipt of order/judgment or when applicant came to know of order/judgment – Whether there was delay in application – Whether there were valid, cogent or acceptable explanation for delay – Whether extension of time ought to be allowed – Rules of Court 2012, O. 13 r. 8 & O. 42 r. 13*

CIVIL PROCEDURE: *Judgments and orders – Default judgment – Setting aside – Default judgment entered against bankrupt – Bankruptcy order annulled – Whether leave of court obtained – Whether judgment ought to be set aside – Whether annulment of bankruptcy order meant that there had never been any adjudication and there was no bankrupt – Whether default judgment regular – Whether applicant entitled to set aside default judgment ex debito justitiae*

The plaintiff had granted banking facilities to the first defendant and this was guaranteed by the second and third defendants. The first defendant defaulted in the repayment of the facilities. This prompted the plaintiff to commence the writ in this suit against the defendants for the recovery of the outstanding sums. When the defendants failed to enter an appearance, the plaintiff entered a default judgment against them on 23 November 2016 ('judgment'). Unbeknownst to the plaintiff, the second defendant had earlier been adjudicated bankrupt on the petition of another creditor ('2016 bankruptcy'). Upon the second defendant's application under s. 105 of the Bankruptcy Act 1967 ('Act'), the orders in the 2016 bankruptcy were annulled ('annulment order'). Still unaware of the 2016 bankruptcy and the annulment order, the plaintiff commenced bankruptcy proceedings against the second defendant on the judgment and, following that, obtained adjudication and receiving orders ('orders') against him ('2019 bankruptcy'). The second defendant applied to set aside the orders in the 2019 bankruptcy and his application was allowed.

On 14 December 2021, which was a little over five years later, the second defendant filed an application (i) to set aside the judgment; (ii) for an extension of time to file the application as he did not know of the judgment and only found out about it when he learned of the orders in the 2019 bankruptcy; and (iii) for leave to defend the action in this writ. In support of his application, the second defendant submitted that (i) in the absence of the leave of court under s. 8(1) of the Act, the writ and the judgment were bad in law as he was an undischarged bankrupt when the two were entered; and (ii) he was entitled to have the judgment set aside *ex debito justitiae*. The Senior Assistant Registrar dismissed the application. Hence, the present appeal.

Held (dismissing second defendant's application):

(1) Under O. 13 r. 8, read with O. 42 r. 13 of the Rules of Court 2012 ('ROC'), the time for applying to set aside a default judgment runs from the receipt of the order or the judgment, not from when a defendant came to know of it. If it were to run from when a judgment debtor came to know of it, then it would be pretty much a debtor's charter to allege when he came to know of it, expect that allegation to be accepted as the truth since a plaintiff could not be expected to prove what he knew and never be out of time. Even if, in law, time did begin to run from when the second defendant came to know of it, it was clear that the second defendant would have known of the judgment by 22 February 2021, the date on which he applied to set aside the orders in the 2019 bankruptcy, as the orders were made in bankruptcy proceedings based on the judgment. However, that was still just short of ten months before he filed the application and therefore, still way beyond the 30-day period prescribed by O. 13 r. 8 read with O. 42 r. 13 of the ROC. The second defendant could not explain the delay. With no valid, cogent or acceptable explanation for the delay, his application for an extension of time was rejected. (paras 19, 20 & 22)

(2) The plaintiff did not obtain any leave of the court under s. 8(1) of the Act before filing the writ or entering the judgment. Even though the omission would have ordinarily resulted in the judgment being set aside, the annulment order changed things dramatically. The annulment of the adjudicating order necessarily meant that there had never been any adjudication and that the second defendant was never a bankrupt. Therefore, there was no requirement on the plaintiff to obtain any leave of the court, under s. 8(1) of the Act, to file the writ against him. It necessarily followed that the writ and the judgment were regular and the second defendant was not entitled to set the judgment aside *ex debito justitiae*. (paras 25-26 & 38)

(3) The second defendant adduced 'Cadangan Pernyataan Pembelaan' where, in it, he made a whole series of admissions including to being a director of the first defendant; that the first defendant obtained the loan facilities from the plaintiff; and that he stood as a guarantor. The second defendant did not dispute the default by the first defendant. The foundation of his defence was instead predominantly based on the fact that he was a bankrupt at the time the writ was filed. The second defendant had no defence on the merits to the plaintiff's claim. (paras 39 & 40)

Case(s) referred to:
Dato' Hj Mohd Muslim Othman v. Shuaib Lazim & Anor [1992] MLJU 109 ***(refd)***
In re Keet [1905] 2 KB 666 ***(refd)***
Kwong Yik Bank Bhd v. Hah Chiew Yin [1985] 2 CLJ 31; [1985] CLJ (Rep) 178 FC ***(refd)***
Mohamed Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed [2002] 7 CLJ 77 HC ***(refd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***
Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1), 33(1), (3), 105(1), (2), (3)
Rules of Court 2012, O. 13 r. 8, O. 42 r. 13, O. 56

For the plaintiff - Noraini Yacob; M/s Sidek Teoh Wong & Dennis
For the defendants - Muhammad Fairuz Ahmad Yusof; M/s Fairuz

Reported by Najib Tamby

JUDGMENT

Azlan Sulaiman JC:

Overview

[1] This suit was filed and default judgment entered against the second defendant at the time when he was an undischarged bankrupt, and without the leave of the court under s. 8(1) of the (then) Bankruptcy Act, 1967 (now Insolvency Act 1967) ("the Act"). However, he subsequently applied for and obtained an order annulling that bankruptcy, and later applied to set aside the judgment, which the Senior Assistant Registrar dismissed at first instance. I dismissed his appeal against the Senior Assistant Registrar's decision. One of the main issues in these grounds of judgment is the effect of annulment on the writ and the judgment that would otherwise have been filed in contravention of s. 8(1) of the Act.

The Facts

[2] The second defendant and the third defendant were directors of the first defendant and had guaranteed the repayment of banking facilities that the plaintiff had granted to the first defendant.

[3] When the first defendant defaulted on the repayment of the facilities, the plaintiff demanded payment from all three defendants and then on 21 October 2016 filed the writ in this suit against them to recover the outstanding sums.

[4] When they all failed to enter an appearance to the writ, on 23 November 2016 the plaintiff entered a default judgment against all three defendants ("the judgment").

[5] Unbeknown to the plaintiff, the second defendant had earlier on 29 August 2016 *ie*, prior to the writ and the judgment, been adjudicated bankrupt on the petition of another creditor named OTM Group Sdn Bhd, in Shah Alam High Court Bankruptcy No: BA-29NCC-173-01-2016 ("the 2016 bankruptcy").

[6] On 13 June 2019, on the second defendant's application under s. 105 of the Act, the adjudication and receiving orders in the 2016 bankruptcy were annulled ("the annulment order").

[7] In July 2019, still unaware of the 2016 bankruptcy or the annulment order, the plaintiff commenced bankruptcy proceedings against the second defendant on the judgment, and on 5 February 2020 obtained adjudication and receiving orders against him ("the 2019 bankruptcy").

[8] On 22 February 2021, the second defendant applied to set aside the adjudication and receiving orders in the 2019 bankruptcy, and on 22 September 2021, his application was allowed.

[9] On 14 December 2021 he then applied to this court for the following orders:

(i) for an extension of time to file the application;

(ii) to set aside the judgment as against him;

(iii) for leave to defend the action in this writ.

("the second defendant's application")

[10] The second defendant's main contention is that, as he was an undischarged bankrupt at the time, the writ was filed and the judgment entered against him, and in the absence of any the leave of the court under s. 8(1) of the Act, then the writ and judgment are bad in law and he is entitled to have the judgment set aside as against him *ex debito justitiae*.

[11] It is to be noted that the other defendants have not filed any application to set aside the judgment, though in truth that fact has no bearing on the second defendant's application.

[12] On 9 March 2022, the Senior Assistant Registrar dismissed his application, and he then appealed to me under O. 56 of the Rules of Court 2012 ("the Rules").

[13] It is trite law that an appeal to the judge under O. 56 of the Rules is by way of a re-hearing, (see *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30). Thus, I re-heard the second defendant's application.

[14] The issues to be addressed and decided were:

(i) whether the extension of time should be granted;

(ii) whether the judgment should be set aside; and

(iii) whether the second defendant should be given leave to defend the action.

Extension Of Time

[15] Under O. 13 r. 8 read with O. 42 r. 13 of the Rules, a party intending to set aside a default judgment "shall make an application to the court and serve it on the party who has obtained the order or judgment within 30 days after the receipt of the order or judgment by him."

[16] Here the judgment was entered on 23 November 2016 and the second defendant only applied to set is aside a little over five years later, on 14 December 2021. Hence, the application for an extension of time.

[17] The second defendant alleges that he did not know of the judgment, and only found out about it when he learned of the adjudication and receiving orders in the 2019 bankruptcy. He then contended that there was no delay because he could only have filed the application to set aside the judgment after he has set aside the adjudication and receiving orders in the 2019 bankruptcy.

[18] The plaintiff contended otherwise. It adduced evidence of service of the judgment on the second defendant in November 2016, and therefor contended that the second defendants had failed to explain the delay.

[19] I would agree with the plaintiff. Under O. 13 r. 8 read with O. 42 r. 13 of the Rules, the time for applying to set aside a default judgment runs from the receipt of the order or judgment, not from when a defendant came to know of it. If it were to run from when a judgment debtor came to know of it, then it would be pretty much a debtors' charter to allege when he came to know of it, expect that allegation to be accepted as the truth (since a plaintiff could not be expected to prove what he knew), and never be out of time.

[20] Nevertheless, even if in law time did begin to run from when the second defendant came to know of it, it is clear from the facts of this case that the second defendant would have known of the judgment by 22 February 2021, the date on which he applied to set aside the adjudication and receiving orders in the 2019 bankruptcy as the orders were made in bankruptcy

proceeding based on the judgment. However, that was still just short of ten months before he filed the application, and therefore still way beyond the 30-day period prescribed by O. 13 r. 8 read with O. 42 r. 13 of the Rules.

[21] The second defendant's contention that he could have filed the application only after he successfully applied to set aside the adjudication and receiving orders in the 2019 Bankruptcy is also untenable. There was nothing to stop him from applying to set aside the judgment concurrently with applying to set aside the adjudication and receiving orders in the 2019 bankruptcy. In fact, had he applied and successfully set aside the judgment first, then the adjudication and receiving orders in the 2019 bankruptcy would naturally have fallen because the basis of the bankruptcy proceedings in which those orders were made was the judgment.

[22] In the final analysis, he could not explain the delay. With no valid, cogent or acceptable explanation for the delay, I rejected his application for an extension of time.

The Judgment

[23] As I said earlier, the second defendant's contention is that he is entitled to have the judgment set aside as against him *ex debito justitiae* because he was an undischarged bankrupt when the writ was filed and the judgment was entered against him, and the plaintiff had failed to obtain the leave of the court under s. 8(1) of the Act.

[24] Section 8(1) of the Act provides:

> On the making of a bankruptcy order, except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[25] It is not in dispute that the plaintiff did not obtain any leave of the court under s. 8(1) of the Act before filing the writ or entering the judgment. That omission would ordinarily have resulted in the judgment being set aside.

[26] However, in my view, the annulment order changes things dramatically.

[27] Under the Act, a bankrupt can be released from his status as a bankrupt by either an order obtained pursuant to s. 33 of the Act or by an order under s. 105 of the Act.

[28] Section 33(1) and (3) of the Act come under the heading "discharge of bankrupt by order of court" and provide:

(1) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

(3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards, become due to the bankrupt, or with respect to his after-acquired property.

[29] On the other hand, s. 105(1), (2) and (3) of the Act under the heading "Power of court to annul bankruptcy order in certain cases" provide:

(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order.

(2) Where a bankruptcy order is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts thereto for done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

(3) Notice of the order annulling a bankruptcy order shall be forthwith gazetted and published in at least one local paper.

[30] Though a person obtaining either an order of discharge or an order of annulment would no longer be a bankrupt, the legal effect of an annulment order is more far-reaching. Whilst an order of discharge would mean that that person is discharged as a bankrupt from the date he obtained that order, any person obtaining an order annulling his bankruptcy would be deemed to have never been adjudged a bankrupt in the first place.

[31] In *In re Keet* [1905] 2 KB 666, Stirling LJ said of an annulment order that its effect is to "wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication".

[32] In *Kwong Yik Bank Bhd v. Hah Chiew Yin* [1985] 2 CLJ 31; [1985] CLJ (Rep) 178; [1985] 2 MLJ 452 applied *In re Keet* Seah FJ said:

> It is pertinent to observe that the bankrupt was not applying for an order of discharge but was applying for an order annulling her adjudication. The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order (per Stirling LJ in *In re Keet* [1905] 2 KB 666, 676).

[33] These decisions highlight the major difference between the discharge and annulment of an adjudication order. In the former, a bankrupt is discharged, but he will always have that record of having been adjudged as a bankrupt. In the latter, it is as if he was never so adjudicated.

[34] The advantage of the legal effect of a nullification of bankruptcy has been used in the political arena. In *Dato' Hj Mohd Muslim Othman v. Shuaib Lazim & Anor* [1992] MLJU 109, the petitioner and first respondent were competing candidates for the election as State Assemblyman for the N. 23 Pantai Merdeka constituency in Kedah. The petitioner objected to both the nomination and election of the respondent to that exalted position on the ground that he was at the material time an undischarged bankrupt. However, by the time the election petition came up for hearing, the respondent had applied for obtained an order annulling the adjudication order. Abdul Malek Ahmad J said:

> Based on the submissions on 15 August 1990 and the additional written submissions filed before this date by learned counsel for all three parties, my finding is that the annulment of the adjudication order on 16 March 1990 had the effect of wiping it out altogether. As stated by Stirling LJ in *In Re Keet* [1905] 2 KB 666.
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> > He is not applying for an.order of discharge, but he is applying for an order of annulment under s. 35, which permits that where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, *the court may, on the application of any person interested, by order, annul the adjudication – that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.*
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> The Federal Court in *Kwong Yik Bank Bhd. v. Hah Chiew Yin* [1985] 2 MLJ 452 had reiterated this principle by stating:
>
> > It is pertinent to observe that the bankrupt was not applying for an order of discharge but was applying for an or der annulling her adjudication. The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order (per Stirling LJ in *In Re Keet*).
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> Unlike the example given by learned counsel for the petitioner namely that an order for the dissolution of marriage did not mean that the marriage never took place, I would say that his comparison is not quite

to the point as that involves merely a dissolution and not an order for nullity and that this finding is more appropriately compared to a marriage which had never been consummated, or where the parties are within the prohibited degrees of consanguinity, or when either is not of his or her supposed sex, or is so sexually malformed or impotent as to be incapable of living conjugally with the other, or has a wife or husband living, or is insane, or when the marriage has been brought about by fraud, or is in violation of a legal prohibition or in breach of an essential legal prescription. In that situation, when one party applies to put an end to it on any of the stated grounds and the nullity order is given, it would be similar to the marriage having not taken place at all. As stated by Russell, J in *Re Wombwell's Settlement* [1922] 2 Ch. 298

> The result of a decree of nullity of marriage is that not only are the parties not now married but they never were.

With this finding, it follows that the first respondent was not a bankrupt on 12 March 1990, that is, on nomination day and was therefore not a disqualified person for the purposes of election. I had accordingly granted the order in terms of the first respondent's second prayer in enclosure 41 but since I believe this is the first time this question of law had been raised and decided, I would order that each party bear their own costs. Consequently, the election petition would have to be dismissed with no order as to costs. (emphasis added)

[35] The legal effect of a nullification of bankruptcy has also been used in the pursuit of less-exalted positions like president of a registered society. In *Mohamed Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed* [2002] 7 CLJ 77, the plaintiff applied for and obtained an order *in absentia* for the defendant to hand over to the plaintiff the records and documents of the Pertubuhan Kongres Indian Muslim Malaysia ("KIMMA") and to refrain from holding himself out as the President of Kl MMA for the session of 2000-2002, which position he had purported to be elected to on 11 August 2000. The basis of the plaintiff's application was that, prior to his election, the defendant had on 6 November 1997 been adjudicated a bankrupt and that, at the time of his election he remained undischarged from that. The defendant appealed and filed for a stay of the order pending the disposal of his appeal. In support, he adduced evidence of an order dated 24 November 2000 obtained after his election but before the plaintiff filed his application, of the adjudicating and receiving order being made against him on 6 November 1997 being annulled. In allowing the stay, Abdul Aziz Mohamad J followed *In re Keet a*nd further held that the annulment would have retrospective effect. He said:

> I hold, therefore, that an annulment of adjudication of bankruptcy has retrospective effect, but subject of course to sub-s. (2) of s. 105 of the Act.

[36] The legal effect of a nullification of bankruptcy has also been used in the commercial arena. In *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661 the appellant filed a civil suit against the respondent bank to recover a sum of RM233,155 with interest, alleging the respondent's negligence and/or breach of trust. The case was only disposed of by the High Court in the appellant's favour some eight years. In the meantime, three years after he had filed the suit and five years before he obtained judgment, the appellant was adjudicated a bankrupt, on the petition of the Lembaga Hasil Dalam Negeri, for unpaid taxes. Upon settling his dues, the appellant applied for and obtained an order annulling his adjudication of bankruptcy. However, the respondent bank challenged the validity of the judgment because it was entered before the annulment. The appellant appealed. In allowing his appeal, Zaki Tun Azmi CJ considered the four case authorities I have referred to above and said:

> After having carefully and fully considered all that I have mentioned earlier, I have come to this decision. Section 105 is to be strictly construed, not only based on the wording of that section but also how the section came into being. It is not for me to say why the legislators deem it fit to enact such a provision. It is for me only to interpret it.
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> Once the bankruptcy is annulled, on either the first or second ground, the effect of that annulment is as Stirling LJ had said in *Re Keet*:
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> > that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.
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> Or as what Pincus JA and White J in the Australian case also said 'the former bankrupt is, in general, treated as never having been made a bankrupt; that is the effect of the annulment'.
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> 'Annul' means '1. Declare (a marriage *etc*) invalid. 2. Cancel, abolish' (see *Concise Oxford Dictionary* (9th Ed)). If there are any objections it should be made at the stage of appeal or the application for annulment. What happens if the bankrupt failed to disclose material facts or misrepresented those facts at the application for annulment? Perhaps judges should be wary when considering applications for annulment. They should ask relevant questions for an order for annulment has far reaching consequences. There may also be instances where creditors who become aware of any application for annulment to perhaps object to such application for annulment.
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> For this case before me, my opinion is that the effect of the annulment to the appellant was as if he was never a bankrupt. The issue of whether the appellant should be granted the order of annulment is not for me to say in this appeal.

[37] While the five cases I have mentioned above all involved the party who had the adjudication order against him annulled seeking and obtaining the benefit of that annulment, in my mind an annulment cannot only be used for benefit. For the law to be fair and equitable, the party obtaining the annulment must also accept all negative and adverse consequences that come of and with it.

[38] In this case, the annulment of the adjudicating order necessarily means that there had never been any adjudication and that the second defendant was never a bankrupt. Thus, if there was no adjudication and he was never a bankrupt, then there was no requirement on the plaintiff to obtain any leave of the court under s. 8(1) of the Act to file the writ against him. It necessarily follows that the writ and the judgment are regular, and that the second defendant is not entitled to set the judgment aside *ex debito justitiae*.

Defence On The Merits

[39] In his application, the second defendant adduced his "cadangan pernyataan pembelaan". In it he makes a whole series of admissions, including to being a director of the first defendant; that the first defendant obtained the loan facilities from the plaintiff and that he stood as guarantor; Further, he does not dispute the default by the first defendant. The foundation of his defence is instead predominantly based on the fact that he was a bankrupt at the time the writ was filed.

[40] The above analysis and finding that the annulment meant that he was never a bankrupt leads me to the inevitable conclusion that he has no defence on the merits to the plaintiff's claim.

Conclusion

[41] As the writ and the judgment were regular, and the second defendant failed to raise any cogent or acceptable for being given an extension of time or for being given leave to defend the plaintiff's claim, I was left with no choice but to dismiss his appeal under O. 56 of the Rules.

[42] I accordingly affirmed the decision of the Senior Assistant Registrar and dismissed the second defendant's application with costs of RM5,000 to the plaintiff, subject to allocator.